Magistrate was satisfied that there was sub-letting to Chan Kow and Kamal Batcha. It should, however, be noted that both Kamal Batcha and Chan Kow had not been called by the prosecution and nor were they made available to the defence. During the trial, Kamal Batcha was still running the book-stall at the outer wall of the shop along the five-foot-way, and Chan Kow was also running business in a shop next door to the demised premises. Failure of the prosecution to call them, in my view, should attract the adverse presumption under section 114(g) of the Evidence Act, in that, if they had been called, they would have given evidence against the prosecution as regards sub-letting. The other two alleged sub-tenants, Loh Lai Kim and Goh Pek Kheng, had given evidence in favour of the appellant (DW2 and DW4). Although the learned Magistrate did not accept the defence evidence regarding Chan Kow and Kamal Batcha, before convicting the appellant, it was his duty to consider whether the defence had raised a reasonable doubt in the prosecution case. (See *Mat* v. *Public Prosecutor*[1] and *Mahadi* v. *Public Prosecutor*[2]). The failure of the learned Magistrate to do so would amount to a misdirection in law as to the onus of proof placed on the defence. It is important that the court must give reason or reasons for rejecting the defence story. After that, the court must go one step further before convicting. As stated by Suffian J. (as he then was) in *Mat* v. *Public Prosecutor*:

"But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt. . . ."

In the circumstances, I allow this appeal. I quash the conviction and set aside the sentence of $250 fine in default one month imprisonment. If the fine has been paid, I order that the money be refunded to the appellant.

Conviction quashed and sentence set aside.

Solicitors: *Chew & Co.*

TAN TEO MUAH & ORS. v. ALKHARED & KHOO HOLDINGS SDN. BHD.

[O.C.J. (Arulanandom J.) April 21, 1980 & April 8, 1981]
[Penang — Originating Motion No. 5 of 1980]

Land Law — Caveat — Application to remove — Expiry of first caveat — Whether respondents could lodge second caveat — National Land Code, s. 326(2).

The facts in this case are briefly as follows. On the strength of an agreement of March 17, 1978, for the applicants to provide a piece of land for the purpose of constructing and erecting dwelling houses, the respondents had lodged a caveat against the said land. On October 18, 1979, the applicants caused a notice in Form 19C of the National Land Code to be served on the respondents for removal of the first caveat. By an *ex parte* Originating Summons of November 9, 1979, the respondents applied for the extension of the first caveat. On November 22, 1979, the said caveat was extended under section 326(2) of the National Land Code. The provisions of the said section 326(2) require "any person on whose application the caveat is extended to serve the order of court on the Registrar of Titles, who on being duly served is enjoined not to remove the caveat."

In the present case the respondents had failed to serve the relevant order on the Registrar and the caveat was accordingly removed after the period allowed by the notice in Form 19C. When the respondents realized that this had happened they immediately caused a further caveat to be lodged against the said land.

The question before the present court was whether the respondents were entitled to lodge a second caveat when the first had been removed.

Held, allowing the applicants' application: (1) once a caveat is removed, the removal is conclusive and it is extinguished forever;

(2) the second caveat should be removed forthwith.

Cases referred to:-

(1) *Damodaran* v. *Vasudeva* [1974] 1 M.L.J. 128, 129 & 130.

(2) *Arul Chandran* v. *Tara Rajaratnam* [1979] 2 M.L.J. 172, 174.

ORIGINATING MOTION.

R. Manecksha for the applicants.

N. Chandran for the respondents.

Cur. Adv. Vult.

Arulanandom J.: This was an application by motion by the applicant for an order that Caveat No. 2309/79 Jilid 35 Folio 189 lodged by the respondents Alkhared & Khoo Holdings Sdn. Bhd. in respect of Lot No. 1869 Mukim 13 Daerah Timor Laut, Pulau Pinang be removed.

The issue before the court was very simple. On the strength of an agreement dated March 17, 1978 for the applicants to provide a piece of land for the purpose of constructing and erecting dwelling houses, the respondents had lodged a caveat against the said land (hereinafter referred to as the first caveat). On October 18, 1979, the applicants caused a notice in Form 19C of the National Land Code to be served on the respondents for removal of the first caveat. The respondents promptly applied by an *ex parte* originating summons dated November 9, 1979, for an extension of the said first caveat and on November 22, 1979, the said caveat was extended under section 326(2) of the National Land Code.

Section 326(2) of the *National Land Code* reads as follows: —

"(2) The court may, on the application of any person or body on whom such a notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of one month; and the Registrar, on being duly served with any order of the court under this sub-section, shall not remove the caveat until the expiry of the said period as thereby extended."

By the provisions of this section it is incumbent on any person on whose application the caveat is extended to serve the order of court on the Registrar of Titles, who on being duly served is enjoined not to remove the said caveat.

In this instance, however, for reasons best known to themselves the respondents failed to serve the relevant order on the Registrar and the caveat was accordingly removed after the period allowed by the notice in Form 19C.

When the respondents realised that this had happened they immediately caused a further caveat, No. 2309 Jilid 35 Folio 189 (the subject-matter of this application), to be lodged against the said piece of land.

The question before the court was simply this — whether the respondents were entitled to lodge this second caveat when the first had been removed.

The question has been considered by these courts previously and the answer has been that once a caveat is removed, the removal is conclusive and it is extinguished forever.

In the first case Syed Agil Barakbah in *Damodaran* v. *Vasudeva*[2] states as follows: —

"In the present case, the respondent on receipt of notice of the intention for the intended removal of the caveat from the Registrar on September 7, 1973, should have applied to the court for its extension under sub-section (2). Instead of doing so he applied for and obtained another caveat when the first caveat was still in existence. The result is that in the absence of such application for extension under sub-section (2) the first caveat according to sub-section (1)(b) must be removed by the Registrar on October 7, 1973, i.e. on the expiry of one month as specified in the notice. In other words, on that date the first caveat would no more be in existence.

Now, in answering the main question one has to look at sub-section (2) of section 326. The object of the sub-section is dealt with in precise detail by Raja Azlan Shah J. (as he then was) in *Lim Kiat Moy* v. *Hamzah* ([1966] 2 M.L.J. 175 at page 176) which I accept with respect. It is clear that the word "extend" appearing in the sub-section has to be construed according to "its use in the common intercourse of mankind and the popular meaning attributed to it is that it enlarges or gives further duration to any existing right rather than re-vest an expired right". In other words, it points to the existence of a caveat which it allows to be extended by order of court from time to time. It does not speak of a re-creation as to allow the issue of another caveat on or before the expiry of the existing one. This is because once a caveat has lapsed and a memorial thereof is made by the registering authority, it is extinguished forever and the court has no power to revive, renew or continue a caveat after its lapse. The extinction is final and irrevocable. (*Per* Ong J. (as he then was) in *K.I. Muhiudeen Rawther* v. *K.E.P. Abdul Kassim & Ors.* [1959] M.L.J. 257). If the sub-section were to be construed otherwise a great public injury would be effected by calling back a right that by lapse of time has become extinct. (*Per* Raja Azlan Shah J. (as he then was) in *Lim Kiat Moy's* case, *supra*). Further, section 328(1) provides for a caveat to lapse at the expiry of six years from the time from which it took effect unless earlier withdrawn or removed. Considering its object and function the period is long enough for one caveat to be in existence at any one time without there being entered another caveat.

The provisions of section 329(2) requires scrutiny. It disallows the Registrar to entertain any application for the entry of a further caveat if it is based on the like claim as that on which the former was based in cases where the court has ordered the removal of the former or has turned down an application for extension of time. The sub-section must be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words, it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other. In the light of the above, and construing the relevant provisions of the Code as a whole as regards the subject, the only natural and logical construction that can be given by way of analogy is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds. To construe otherwise will contravene the real intention of Parliament and tend to oust the jurisdiction and power of the court under section 326 which arise in this case. If the law is allowed to be circumvented by recognising the second caveat the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator."

This construction of the provisions of the National Land Code *re* Caveats was followed and applied by Syed Othman J. (as he then was) in the case of *Arul Chandran* v. *Tara Rajaratnam*[2] where, at page 174, he states as follows: —

"In dealing with this point, I need only advert to the judgment of Syed Agil Barakbah J. in *Damodaran* v. *Vasudeva* ([1974] 1 M.L.J. 128, 129) where at page 129 he discussed several authorities. He referred to *K.I. Muhiuddeen Rawther* v. *K.E.P. Abdul Kassim* ([1959] M.L.J. 257) where Ong J. (as he then was) said that the extinction of a caveat is final and irrevocable. It seems to be established law that the court has no power to remove, renew or extend a caveat after its lapse. I should add if it is based on the same claim. Under section 326(2) of the National Land Code the power to extend the life of the caveat lies with the court. The respondent ignored the Collector's notice to remove the caveat. She did not apply to the court for extension. Applying the above principle, the removal by the Collector has the effect of extinguishing the caveat. In my view, the action of the respondent in lodging another caveat, based on the same claim after the Collector had removed the first caveat and without seeking the court's order, was tantamount not only to spurning the Collector's act done according to law, but also to usurping the powers of the court. Considering this act of the respondent and then her non-disclosure to the court that the first caveat had been removed, I do not think she has any ground, equitable or legal, to maintain the caveat. Further, the land, by reason of her own act in having transferred it, has lost its original user, as it is being developed into a housing estate. The applicant must have expended substantial sums for the development. Regard must be had to this and to public interest as well. But in spite of all this, I would not say that the respondent is without remedy. If she could establish her claim, damages should be appropriate remedy in the circumstances of the case."

I was fully in agreement with the interpretation of the law by my learned brothers and had no hesitation in following it. I therefore ordered that the application be allowed with costs and the said caveat be removed forthwith.

Application allowed.

Solicitors: *Lim Kean Siew & Co.; Presgrave & Matthews.*

FOREST DEVELOPMENT SDN. BHD. v. SYARIKAT PERMODALAN DAN PERUSAHAAN PAHANG BHD.

[O.C.J. (George J.) April 16, 1981]
[Kuantan — Civil Suit No. 148 of 1980]

Arbitration — Agreement referring to arbitration — Breach of agreement — Purported termination of agreement — Application for stay of action — Whether party terminating agreement could still rely on arbitration clause — Arbitration Act, 1952, s. 6.

The defendants in this case sought for an application for a stay of all further proceedings in the action pursuant to section 6 of the Arbitration Act, 1952, and in reliance on the arbitration clause contained in a written agreement entered into by the plaintiffs and the defendants on May 8, 1976.

A number of differences and disputes between the parties had arisen which culminated in the defendants purporting to terminate the Agreement.

The basic issue for adjudication between the parties was whether the defendants by their action in purporting to terminate the Agreement were in breach of the terms of the Agreement.

Held: (1) the act of purporting to terminate the Agreement was not, *per se*, tantamount to a demonstration of unwillingness on the part of the defendant to have the disputes and differences between the parties arbitrated upon;

(2) the defendants were entitled to have the action stayed under section 6 of the Arbitration Act 1952.

Cases referred to:-

(1) *Davis* v. *Starr* (1889) 41 Ch. D. 242.